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No. 03-2

In The
Supreme Court of the United States

OXFORD ASSET MANAGEMENT, LTD.,
and SUSMAN & WATKINS,

Petitioners,

v.

MICHAEL JAHARIS, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

KOS RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a complaint that is based on internally inconsistent factual allegations, unwarranted deductions, and legal conclusions satisfies the pleading standard of Fed. R. Civ. P. 8(a), which requires a "plain statement of the claim showing that the pleader is entitled to relief"?

2. Whether liability for an omission can arise under § 11 and § 12(a)(2) of the Securities Act of 1933 if the prospectus at issue (a) has disclosed everything specifically required by the securities laws, and (b) was not misleading without the omitted information?

3. Whether a district court may impose sanctions under the Private Securities Litigation Reform Act and Fed. R. Civ. P. 11 on the ground that the evidence uncovered by the Plaintiffs' investigation established that their claims were "objectively frivolous"?

LIST OF PARTIES

The Petition correctly lists the parties; however, for convenience, this brief uses "the Kos Respondents" to designate collectively Kos Pharmaceuticals, Inc. and the related individual defendants, Michael Jaharis, Daniel M. Bell, Duncan H. Cocroft, Juan F. Rodriguez, Robert E. Baldini, John Brademas, Steve Jaharis, Louis Lasagna, Mark Novitch, and Frederick B. Whittemore.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Kos Pharmaceuticals, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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COUNTERSTATEMENT OF THE CASE

Petitioners Oxford Asset Management, Ltd. and Susman & Watkins (collectively "Oxford") misstate the holdings of the courts below in an effort to create an issue worthy of review. An analysis of the actual rulings in this case demonstrates that the petition lacks merit and should be denied.

The Eleventh Circuit's decision in this case does not raise the first question posed by Oxford – whether a heightened pleading standard applies to a complaint seeking recovery under § 11 and § 12(a)(2) of the Securities Act of 1933. The Eleventh Circuit did not even mention, much less rule on a heightened pleading standard. Rather, it merely affirmed the district court's express holding that the usual notice pleading standard of Fed. R. Civ. P. 8(a) applies to Oxford's strict liability securities claims. *See* Appendix to Petition (hereinafter "App.") 7, 34-37.

Oxford's description of the lower courts' "duty to disclose" rulings also is flawed. Oxford inaccurately states that the district court held that "Kos's omission of its first eight weeks of prescription data was immaterial as a matter of law." Petition at 6. The district court pointed out that the prospectus could not have included eight weeks of prescription data because the offering closed before the eighth week. App. 52. It held that the earlier, very preliminary data was not material because, according to the Uhl report on which Oxford based its complaint, it is the eighth week that is the indicator of future commercial performance. App. 9.

Contrary to Oxford's suggestion, the Eleventh Circuit did not "find" that the first eight weeks of prescription data was material. *See* Petition at 17. Like the district

court, the Eleventh Circuit found that "Oxford's assertion that Kos possessed seven weeks of data is literally unbelievable," and that "Kos probably did not possess even six weeks of information." App. 10. The Eleventh Circuit merely "assumed" that the first six weeks of data were material for purposes of a motion to dismiss. App. 11.

After observing that the prospectus contained specific cautionary statements regarding Niaspan®'s market acceptance, the Eleventh Circuit held that there was no duty to disclose the preliminary prescription data because this information was not required by the securities laws and the prospectus was not misleading without it. App. 12-16. The Eleventh Circuit's opinion, therefore, tracks the precise language of § 11, which imposes omission liability only if the prospectus "omitted to state a material fact required to be stated therein or [if the omitted information was] necessary to make the statements therein not misleading." App. 79.

The Eleventh Circuit did not levy sanctions as suggested by Oxford. *See* Petition at 3. It affirmed the award as a proper exercise of discretion because Oxford's claims "were objectively frivolous and counsel for Plaintiffs should have been aware when signing off on the Complaint that it was factually deficient." App. 68. After sifting through Plaintiffs' unsubstantiated and inconsistent allegations, the district court concluded: "In short based on the evidence uncovered by their investigation, Plaintiffs should not have commenced this action." App. 67.

REASONS FOR DENYING THE PETITION

None of the questions posed by Oxford warrants review in this case because each is premised on a less than candid description of the rulings below. This is not an appropriate case for deciding the first question, whether a heightened pleading standard should apply to claims seeking strict liability recovery under § 11 and § 12(a)(2) of the Securities Act of 1933, because the Eleventh Circuit affirmed the dismissal based on the district court's express and proper application of the more lenient notice pleading standard of Fed. R. Civ. P. 8(a). There is no need for the Court to review the second question, the scope of the duty to disclose material information in a prospectus, because the well reasoned decision of the Eleventh Circuit tracks the language of the Securities Act and is entirely consistent with the law of the Second Circuit and other federal courts. The sanctions issue raised by the third question addresses only a fact-intensive discretionary ruling which, as Rule 10 of this Court advises, is not appropriate for review by writ of certiorari.

I. BECAUSE THE COURT BELOW PROPERLY STATED AND APPLIED THE NOTICE PLEADING STANDARD OF FED. R. CIV. P. 8(a), THIS IS NOT AN APPROPRIATE CASE FOR DECIDING WHETHER STRICT LIABILITY SECURITIES CLAIMS ARE SUBJECT TO A HEIGHTENED PLEADING STANDARD

This is not an appropriate case for deciding whether strict liability securities claims are subject to a heightened pleading standard because: (1) the Eleventh Circuit did not hold that a heightened pleading standard applies to Oxford's § 11 and § 12(a)(2) claims; (2) the Eleventh

Circuit correctly affirmed the dismissal of the claims under the notice pleading standard of Fed. R. Civ. P. 8(a); and (3) even assuming an error in the application of the Rule 8 standard, such error would not merit review by the Supreme Court.

1. Neither the Eleventh Circuit nor the district court held that a heightened pleading standard applies to claims under § 11 and § 12(a)(2) of the Securities Act of 1933. Regarding Oxford's "strict liability" securities claims, the district court observed that "[u]nder Fed. R. Civ. P. 8(a)(2), Plaintiffs are required only to set forth in the complaint 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" App. 35. The court also noted, however, that a complaint does not comply with Rule 8 if it is based on internally inconsistent factual claims, unwarranted deductions, or mere legal conclusions. App. 35-36. It reasoned that such a complaint fails because inconsistent or conclusory factual allegations do not "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *See* App. 35. The district court further explained:

> [T]he demands on the pleader are minimal. Nevertheless, minimal requirements are not tantamount to nonexistent requirements. To survive a motion to dismiss, plaintiffs must set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory.

App. 36 (quoting *Cooperman v. Individual Inc.*, 171 F.3d 43, 47-48 (1st Cir. 1999)).

Later in the opinion, the district court applied a much different pleading standard to Oxford's securities fraud claim. "Plaintiffs' claim of fraud under Rule 10b-5 must also satisfy the requirements of Federal Rule of Civil Procedure 9(b), which requires that the 'circumstances constituting fraud . . . must be stated with particularity.'" App. 55. The district court limited the discussion of this heightened pleading standard to its analysis of the Rule 10b-5 claim. In fact, the district court expressly rejected the argument that the § 11 and § 12(a)(2) claims were subject to the heightened pleading requirements of Fed. R. Civ. P. 9 and the Private Securities Litigation Reform Act. App. 41 n.19 ("We do not find it would be appropriate to apply Rule 9(b) to the case before us.").

Oxford appealed the dismissal of its § 11 and § 12(a)(2) claims, but not the fraud claims brought under Rule 10b-5. App. 6. In affirming, the Eleventh Circuit did not suggest that the pleading standard for Rule 10b-5 claims should govern the § 11 and § 12(a) claims. It just accepted the district court's observation that when the complaint is reviewed under Fed. R. Civ. P. 8(a): "The plaintiff's factual allegations are accepted as true. . . . Dismissal is not appropriate unless it is plain that the plaintiff can prove no set of facts that would support the claims in the complaint. . . . However, conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." App. 7.

This common sense principle is not novel; nor does it conflict with the pleading standards embraced by the Fifth, Eighth, or any other circuit as Oxford suggests. In fact, the Eleventh Circuit lifted its "Standard of Review" almost verbatim from a Fifth Circuit case, which cited a leading treatise for this unremarkable proposition. *Id.*

(citing *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993) (citing 2A MOORE'S FEDERAL PRACTICE ¶ 12.07[2.-5], at 12-64 n.6 (2d ed. 1991) (collecting cases)).

Thus, even in the Fifth and other circuits, a non-fraud claim cannot survive a motion to dismiss under notice pleading standards if it is based on unwarranted deductions or mere legal conclusions. *Fernandez-Montes*, 987 F.2d at 284; *see also Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434 (6th Cir. 1988) (noting that legal conclusions do not satisfy notice pleading requirement). Because there is no conflict among the circuits on the only pleading standard discussed by the Eleventh Circuit, this is not an appropriate case for resolving the first question presented by Oxford's petition.

2. Review of the pleading standard is not warranted by Oxford's unsupportable assertion that the Eleventh Circuit implicitly applied an unexplained "heightened fact pleading standard" to the § 11 and § 12(a) claims. Consistent with the stated standard of review, the Eleventh Circuit affirmed the dismissal because these claims were based on internally inconsistent facts and unwarranted deductions.

The "efficacy" claim is illustrative. Citing two studies showing that Niaspan® increases HDL, the "good cholesterol," by 23% and 26%, Oxford alleged that the prospectus falsely represented that Niaspan® increases HDL by a range of 22% to 32%. Noting that the studies identified by Oxford are consistent with the range described in the prospectus, the Eleventh Circuit held that this part of the complaint rested on unwarranted deductions. App. 17. In other words, the complaint failed to state a claim because

its allegations validated the representations made in the prospectus. "[W]hile notice pleading does not demand that a complaint expound the facts, a plaintiff who does so is bound by such exposition." *Romine v. Acxiom Corp.*, 296 F.3d 701, 706 (8th Cir. 2001) (citing *Bender v. Suburban Hospital, Inc.*, 159 F.3d 186, 192 (4th Cir. 1998)); *accord Jefferson v. Ambroz*, 90 F.3d 1291, 1296 (7th Cir. 1996). *See also Oxford Asset Management, Ltd.*, App. 8 (observing that on a motion to dismiss a securities case, the court may consider the prospectus and other documents identified in the complaint).

The Eleventh Circuit properly rejected other parts of the complaint for the same reason. For example, Oxford alleged that the prospectus failed to disclose that 88% of patients taking Niaspan® would experience flushing. The flushing allegations, however, failed to state a claim because the prospectus disclosed that "most patients taking Niaspan will sometimes flush," and that "[t]here can be no assurance . . . that patients using Niaspan will not suffer episodes of flushing that they consider intolerable." App. 18.

Regarding the sales representations, Oxford alleged that the prospectus was misleading because it failed to clarify that sales to wholesalers, not physicians, resulted in the $1.5 million in revenue reported for the quarter ending September 30, 1997. The courts below held that this part of the complaint failed to state a claim because the prospectus plainly stated that Kos was selling Niaspan® to wholesalers, and that Kos's sales force was giving away starter packs to physicians as a promotional effort. App. 20. The sales claim was conclusory and internally inconsistent because it was contradicted by disclosures in the prospectus, which were incorporated by reference into

the complaint. In sum, the Eleventh Circuit correctly applied the notice pleading standard when it affirmed the dismissal of this and the rest of Oxford's claims.

3. There is nothing to suggest that the Eleventh Circuit misapplied the correctly stated requirements of notice pleading. Even if there were, however, such an error would not merit review by the Supreme Court. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.

II. THE ELEVENTH CIRCUIT'S "DUTY TO DISCLOSE" RULING IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE CONTROLLING STATUTE AND THE LAW OF THE SECOND CIRCUIT

The Eleventh Circuit's ruling adheres to the plain language of § 11 as well as the overriding goals of the securities laws by using an objective, two-part inquiry for determining whether there is a duty to disclose arguably material information: (1) Is the information of a type specifically required by the securities laws?; and (2) If not, is the prospectus misleading without it? If, as in this case, the answer to both questions is no, the failure to disclose the information should not result in liability under § 11 or § 12(a)(2) of the Securities Act of 1933.

Ignoring the unambiguous language of the statute, Oxford argues that no such duty to disclose inquiry is necessary. According to Oxford, Second Circuit case law supports its position that the liability inquiry for § 11 and § 12(a)(2) claims begins and ends with a finding that the omitted information was material. Consequently, Oxford

contends that the Eleventh Circuit's opinion was wrong because it refused to find any § 11 or § 12(a) liability despite its assumption that the omitted information was material. Contrary to Oxford's contentions, however, the Eleventh Circuit's opinion not only is correct, it conforms to the language of the controlling statute and is consistent with the decisions of the Second Circuit and other federal courts.

1. The "duty to disclose" ruling in this case did nothing more than track the language of § 11, which imposes omission liability only when a prospectus has "omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." App. 79. The Eleventh Circuit reasoned that "[t]o hold that section 11(a) imposes liability unless the prospectus includes *all* material facts is simply to wholly ignore and render superfluous that section's qualifying language 'required to be stated therein or necessary to make the statements therein not misleading.'" App. 11 (emphasis in original). This rationale also applies to § 12(a), under which an omission is actionable only if the material fact would be necessary "to make the statements, in the light of the circumstances under which they were made, not misleading." App. 85.

Accordingly, the Eleventh Circuit correctly held that Oxford had failed to state an actionable omission under § 11 because, regardless of whether an investor might like to have very preliminary prescription data, the securities laws do not specifically require disclosure of this type of information and, considering the prospectus' many cautionary statements, the prospectus was not misleading without these figures. App. 11-16. The Eleventh Circuit noted that the prospectus disclosed several obstacles to

market acceptance of Niaspan®, including a specific warning that Niaspan®'s sales may grow slowly during the first three to six months of its marketing. App. 9-10.

The First Circuit similarly has relied on the plain language of § 11 to hold that "an issuer of securities owes no absolute duty to disclose all material information." *Cooperman v. Individual Inc.*, 171 F.3d 43, 49 (1st Cir. 1999). " 'Section 11 by its terms provides for the imposition of liability if a registration statement, as of its effective date: (1) 'contained an untrue statement of material fact'; (2) 'omitted to state a material fact required to be stated therein'; or (3) omitted to state a material fact 'necessary to make the statements therein not misleading.' " *Id.* at 50 (quoting *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1204 (1st Cir. 1996)).

The Third Circuit is likewise in agreement that materiality alone will not create a duty to disclose information not otherwise required by the securities laws. "In addition to the duty to disclose specific information required by law, sections 11(a) and 12(2), and Rule 10b-5 impose upon defendants the duty to disclose any material facts that are necessary to make disclosed material statements, whether mandatory or volunteered, not misleading." *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 641 (3d Cir. 1990). Thus, "when defendants voluntarily disclose information, they have a duty to disclose additional material facts only to the extent that the volunteered disclosure was misleading as to a material fact." *Id.* at n.17.

The Eleventh Circuit's "duty to disclose" ruling not only conforms to the language of the statute, it has a practical advantage. It provides issuers with an objective standard for determining whether information should be

included in a prospectus. Because materiality often is subject to dispute, an issuer would be unable to determine if it was revealing all required information if materiality were the only prerequisite for disclosure. If Oxford's position were adopted, issuers likely would overcompensate to avoid uncertain liability. As the Eleventh Circuit observed, such a result "'is hardly conducive to informed decisionmaking,'" because it would bury the shareholders "'in an avalanche of trivial information.'" App. 12 (quoting *Basic, Inc. v. Levinson*, 485 U.S. 224, 231 (1988)).

2. Lifting dicta from a footnote in *Kronfeld v. Trans World Airlines, Inc.*, 832 F.2d 726 (2d Cir. 1987), Oxford attempts to manufacture a conflict between the Eleventh Circuit's "duty to disclose" ruling and the law of the Second Circuit. *See* Petition at 18. The Eleventh Circuit's decision in this case, however, is consistent with the holding of *Kronfeld* and the other Second Circuit decision cited by Oxford, *In re Time Warner Inc. Sec. Litig.*, 9 F.3d 259 (2d Cir. 1993).

Oxford's "strict liability" argument mistakenly relies on footnote 8 in the *Kronfeld* decision and this Court's opinion in *Herman & MacLean v. Huddleston*, 459 U.S. 375, 382 (1983). The footnote in *Kronfeld* contained only dicta regarding whether the duty to disclose should be considered before or after the issue of materiality. The footnote made clear that the *Kronfeld* decision did not turn on this question because the Second Circuit assumed that the district court held that the alleged omissions were immaterial as a matter of law. *Kronfeld*, 832 F.2d at 730 n.8. Although the footnote cited *Huddleston*, the point of *Huddleston* was that § 11 claims do not require proof of scienter. 459 U.S. at 382. The *Huddleston* decision did not hold that § 11 liability could be based on a prospectus'

omission of an allegedly material fact when the omitted information was not "required to be stated therein or necessary to make the statements therein not misleading."

Moreover, the actual holding of the *Kronfeld* court is entirely consistent with the Eleventh Circuit's decision in this case. In *Kronfeld*, stock purchasers brought § 11 and § 10(b) claims against a parent company and its subsidiary, an issuer of stock, for failing to disclose material information in the prospectus describing a preferred stock offering. The stock purchasers claimed that the prospectus was misleading because, although it explained the relationship between the parent and subsidiary, it failed to disclose that the parent had hired an investment banking firm to explore strategic alternatives for the subsidiary and to explain the contemplated alternatives.

In determining whether the district court properly granted summary judgment on § 11 and § 10(b) claims, the Second Circuit found the partial disclosure of the issuer's relationship with its parent company was arguably misleading because it "did not give any fair indication of the equally substantial possibility that [the subsidiary's status] might be terminated." *Id.* at 736. Thus, in reversing summary judgment in favor of the defendants, the Second Circuit applied the well-settled principle of securities law that defendants have a duty to disclose any material facts that are necessary to make disclosures in a prospectus, whether mandatory or voluntary, not misleading.

Contrary to Oxford's suggestion, *Kronfeld* did not hold "that a finding of materiality ends the inquiry and necessarily subjects the non-disclosing issuer to strict liability." *See* Petition at 17. The *Kronfeld* court expressly disclaimed

a ruling on that issue. *Kronfeld*, 832 F.2d at 732 ("[W]e do not address here a pure question of a duty to disclose."). Instead, the Second Circuit framed the issue as whether the prospectus "omitted to state material facts necessary to make the statement therein not misleading; not whether, considered in the abstract, there was an obligation to disclose those facts at that time." *Id.* at 735. Subsequently, the Second Circuit confirmed that *Kronfeld* stands only for the proposition that the defendants had a duty to disclose material facts that were necessary to make statements in the prospectus at issue not misleading. *See Castellano v. Young & Rubicam, Inc.*, 257 F.3d 171, 183 (2d Cir. 2001).

In the *Oxford* decision, the Eleventh Circuit embraced the same rule applied by the Second Circuit in *Kronfeld*: there is a duty to disclose material facts necessary to make statements in the prospectus not misleading. The Eleventh Circuit affirmed the dismissal in this case because the omission of the allegedly material prescription data did not render the prospectus misleading in light of the abundant and detailed cautionary statements contained in the prospectus regarding Niaspan®'s preliminary market acceptance:

> We conclude that the prospectus thoroughly explained the risks involved in marketing Niaspan, and specifically warned that Niaspan might have a slow start. . . . In view of all of this, the *six* weeks of prescription data, which represents only a *very preliminary* indication that Niaspan was starting slowly, did not have to be included in the prospectus. Such indication did not render materially misleading the prospectus's treatment of the market acceptance of Niaspan as an uncertainty.

App. 16 (emphasis in original). Nothing in the opinion below conflicts with the Kronfeld decision.

Similarly, there is no conflict between the Oxford decision and the Second Circuit's opinion in *Time Warner*. In analyzing the duty to disclose and materiality elements in the context of a § 10(b) claim, the *Time Warner* court stated that "a corporation is not required to disclose a fact merely because a reasonable investor would very much like to know that fact. Rather, an omission is actionable under the securities laws only when the corporation is subject to a duty to disclose the omitted facts." *Time Warner*, 9 F.3d at 267. The Second Circuit noted that the duty to disclose and materiality elements merge only "where the disclosure duty arises from the combination of a prior statement and a subsequent event, which, if not disclosed, renders the prior statement false or misleading." *Id.* In *Time Warner*, the Second Circuit thus held that the defendants were under a duty to disclose because the omitted information was necessary to make the prior statements not misleading.

The Eleventh Circuit's "duty to disclose" ruling aligns perfectly with the reasoning of the *Time Warner* decision. The mere fact that an investor arguably might have liked to have the preliminary prescription data did not create a duty to disclose because the securities laws did not require disclosure of this type of information, and the omission of the data did not make statements in the prospectus misleading. App. 12. Oxford's attempt to create a conflict between the law of the Second Circuit and the decision below fails. There is no need for this Court to review the Eleventh Circuit's well reasoned "duty to disclose" ruling.

III. THE SANCTIONS AWARD REFLECTS THE PROPER EXERCISE OF DISCRETION BASED ON FACTUAL FINDINGS WHICH ARE NOT APPROPRIATE FOR REVIEW BY WRIT OF CERTIORARI

The sanctions award is a good example of the sort of fact-based, discretionary ruling that is not appropriate for review by writ of certiorari. The district court did not impose sanctions lightly. Rather, it did so only after affording Oxford oral argument on the motion to dismiss and allowing Oxford to oppose the sanctions motion with expert testimony. The district court awarded sanctions because, even after consulting with experts, Oxford was unable to present the court with a factual basis for its claims. App. 67 n.5.

The district court observed that the studies identified in the complaint did not support Oxford's "efficacy" claims because they were consistent with the prospectus' statements regarding Niaspan®'s efficacy. App. 69. The court also noted that at oral argument on the motion to dismiss, "Plaintiffs conceded that it was 'very possible' that Defendants were 'right' about the figures cited in the Prospectus." *Id.*

When it dismissed the "safety" claims, the court found that Oxford presented only conclusory allegations of misrepresentations, and did not challenge or contradict any of the FDA-approved studies or results. App. 59. The sanctions order again noted this failure, and that the disclosures in the prospectus negated the allegation that Kos misrepresented "flushing" data. App. 70. At oral argument on the motion to dismiss, the only basis given by Oxford for its "intolerability" claim was "that there must be some reason 'why physicians don't prescribe it.'" App.

19. The district court found that Plaintiffs' inability to offer any facts or explanation for this claim further supported the sanctions award. App. 70.

The district court also held that the very portion of the prospectus cited by Oxford in support of its claim that Kos' $1.5 million in sales to wholesalers was misleading "demonstrates that this claim, too, was not well grounded in fact." App. 71. The prospectus clearly indicated that the $1.5 million sales volume related to shipments to wholesalers, not sales to physicians. *Id.* In light of these disclosures, the sales claim, like the others, was objectively frivolous. In sum, the district court imposed sanctions because, as reflected in the order granting the motion to dismiss, "Plaintiffs' counsel has indicated that there is no further information that could be gathered to further specify the allegations of this Complaint" without, as the district court put it, "fishing expeditions." App. 43, 59.

The Eleventh Circuit did not "rubber stamp" the district court's findings on the sanctions issue. The Eleventh Circuit affirmed the bulk of the sanctions award, but it did reverse the sanctions award with respect to one claim that was added late in the case. The Eleventh Circuit concluded that sanctions should not be awarded for bringing this claim because "[t]his argument, though ultimately rejected, was not frivolous." App. 22.

Rule 10 of the Rules of the Supreme Court advises that fact-specific findings such as those that support the sanctions award in this case are not appropriate for review on writ of certiorari. Oxford cannot escape this necessary approach to certiorari by claiming that the legal issues in this case were "unsettled" prior to the Eleventh Circuit's decision. As shown above, the Eleventh Circuit used an

established pleading standard when it affirmed the dismissal. Moreover, the "duty to disclose" ruling is not novel, considering that it tracks the language of § 11 and is consistent with the decisions of other circuits. The Court, therefore, should deny the petition with respect to the third question presented by Oxford because the sanctions award is purely a fact-based decision that is not appropriate for review by this Court.

CONCLUSION

The Court should deny the petition for writ of certiorari.

Respectfully submitted,

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